IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-11

FREDONIA BROADCASTING CORP., INC.,
*Petitioner,*

v.

RCA CORPORATION,
*Respondent.*

## RESPONDENT RCA CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### Cases



### Statutes



### Rules



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## RESPONDENT RCA CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, RCA Corporation, prays that the petition of Fredonia Broadcasting Corp., Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on March 8, 1978 (the "petition") be denied.

## QUESTIONS PRESENTED

1. Whether a trial judge errs in failing to recuse himself, when it comes to his attention that a party is being actively represented by the trial judge's former law clerk who actively participated as a law clerk in the first trial of the case, and it is inappropriate to disqualify counsel.

2. The court of appeals, on independent grounds for reversal, among other things (i) held that RCA "correctly claims error" on the applicable state-law measure of damages, (ii) held that the trial judge's charge contravened the court of appeals' decision on the first appeal, (iii) discusses the erroneous evidence admitted and sets forth with specificity the limited evidence that should have been admitted, and (iv) remands for further proceedings consistent with its decision.

Fredonia criticizes the Opinion of the court of appeals because it does not contain language stating that the trial judge's errors on questions of state-law damage issues were "harmful" or that the errors "resulted in an erroneous verdict."

Does this criticism present a question for review by this Court on writ of certiorari?

## STATEMENT OF THE CASE

Fredonia's statement of the case is substantially accurate except for the last paragraph (Pet. 5)* which inaccurately and incompletely characterizes the holding of the court of appeals in favor of RCA and the reasons therefor. Accordingly, RCA sets forth the significant proceedings below.

**Disqualification.**

Seven months prior to the second trial of this case, RCA moved in open court to declare a disqualification of Fre-

* References to the Petition and the Opinion are represented by "Pet." and "Opinion" respectively followed by a page reference to the material cited. References to the record on appeal are referenced by an "A" followed by a number, representing the page of the Appendix filed below on which the material cited is found.



donia's counsel because the trial judge's former law clerk who had actively participated with the court throughout the first trial was now actively representing and appearing for Fredonia (A. 286-309). The remedy sought was recusal of the trial judge should removal of Fredonia's counsel seem inappropriate.

The motion was made at a hearing after RCA received unexplained correspondence from the trial judge addressed to his former clerk, as counsel for Fredonia, even though the clerk had never been counsel of record in the matter. This correspondence (copy attached as A-1) had asked the former clerk for the position of Fredonia regarding RCA's motion for judgment on its $506,333.80 counterclaim which had been tried — and denied — while the law clerk was still with the judge at the first trial. At the hearing on RCA's motion, the former law clerk appeared before the trial court on behalf of Fredonia.

At the beginning of the hearing, counsel for RCA expressed RCA's concern over the "appearance of impropriety" and the substantive "very distinct advantage to Fredonia" created by what had transpired and what might occur. Fredonia's counsel objected to its disqualification and even to the recusal of the judge. The trial judge, by order, refused to declare Fredonia's counsel disqualified or to recuse himself (A. 84-85). In his order, the trial judge set forth the undisputed facts that the former law clerk had "participated in the recent proceedings in the case" and had "worked on the case when it was tried for the first time." Nonetheless, the trial judge ruled that no law or rule required disqualification of the firm, that his recusal "would not serve any purpose" and that he had been advised that the clerk would "participate no further" in the case.

The court of appeals held that having been presented with a situation where the appearance of impropriety was

already established, the trial judge should have purged the disqualifying relationship by recusing himself.*

**State-Law Damage Issues.**

At the trial, RCA frequently objected to evidence which fell outside the scope of any proper measure of damages according to Texas law or the opinion of the court of appeals on the first appeal of the case. Over RCA's objection, Fredonia was permitted to introduce evidence which contravened the opinion of the appellate court on the first appeal and additional evidence, in contravention of Texas law, which included "fictitious, conjectural, speculative, or contingent values" (Opinion 259). The court of appeals on the present appeal concluded that "RCA correctly claims error in the trial court's instructions, in the second trial, on the measurement of damages" (Opinion 259) and sets forth, with specificity, the damages, if any, to which Fredonia may be entitled according to Texas law.

Fredonia's statement of the case avoids any reference to the court of appeals' Opinion regarding state law damage issues.

## ARGUMENT

None of the character of reasons contemplated by Supreme Court Rule 19 suggests that this case is appropriate for review by certiorari.

As to the disqualification issue, the court of appeals' decision is in furtherance of established principles reflected in the decisions of this Court and this Court's Rule 7 and similar rules of other courts. The court of appeals in applying these familiar concepts exercised its supervisory powers to protect the integrity of the judicial process by determining the propriety of a judge's decision to sit in judgment. *United States* v. *Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109-110 (5th Cir. 1974); see also, *Texaco, Inc.* v. *Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

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* On June 30, 1978, on the basis of the court of appeals' decision, the chief judge of the Eastern District of Texas ordered the transfer of the case to a different judge in the district.



On the state law damage issues, Fredonia's petition is aimed at language style in the Opinion of the court of appeals, and in fact presents no substantive issue for review by this Court.

**Disqualification.**

The court of appeals' Opinion itself contains an admirably succinct statement of why the trial judge below should have recused himself (569 F.2d at 255, 256):

> No matter how many assurances were given by Fredonia's counsel that the former law clerk would withdraw from the case, we think it clear that the propriety of continuing the proceedings before this district judge had been irrevocably tainted, and the impartiality of the judge had been reasonably questioned.
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> • • •
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> When, as here, a judge is confronted with a situation where the appearance of impropriety is already established, a taint on the judicial system remains as long as he presides over the case.

This statement reflects the spirit of Justice Frankfurter's equally succinct and sterling passage on recusal in *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 466-467 (1952).

> The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which

> men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

Fredonia treats these sensitive ethical considerations as if they never existed. Fredonia's argument instead scrambles together two quite different factual circumstances — one that did happen and one that did not — in order to create an issue in this Court which never existed below. Starting with the premise that RCA's motion was to have *Fredonia's counsel,* and not the trial judge, declared *disqualified in that particular court,* Fredonia nimbly jumps to the proposition that because it is now established the judge should have recused himself to cure that uniquely limited disqualification of counsel, RCA should have filed an affidavit pursuant to 28 U.S.C. §144 so as to seek *disqualification of the trial judge for personal bias.*

Fredonia's argument thus proceeds upon the premise that any time a judge recuses himself, such recusal must be because of personal bias and prejudice. Such a premise is, of course, untrue. Judges must and do recuse themselves on many occasions, even without suggestion of counsel, whenever there exists an appearance of impropriety that might jeopardize notions of fairness. Merely because the proper remedy was recusal does not mean that the trial judge could not have proceeded fairly in this case — had not his law clerk been one of counsel representing Fredonia before that judge. The trial court *could* have dis-



qualified counsel from representing Fredonia altogether in the case, thereby curing any defect. Either remedy, removal of the firm or recusal of the court, would have satisfied ethical imperatives.

Fredonia's argument also fails on its own statement of the facts. If, as Fredonia agrees, RCA's motion sought a declaration of disqualification of the law firm, as it did, and not the trial judge, then there was no reason to proceed under 28 U.S.C. §144. Thus, Fredonia's discussion about requirements of affidavits of personal bias or prejudice of the trial judge never was at issue, nor is it today.* RCA's motion was in fact a motion to declare the disqualification of Fredonia's counsel because of the tainted relationship of the judge's former law clerk having already represented and appeared for Fredonia in the second consideration of this case. RCA based its motion on canons of professional responsibility and on the standards embodied in rules such as Rule 7 of this Court, all of which pointed inexorably to the conclusion that there had been created an appearance of impropriety. RCA did not claim and could not claim that the trial judge had "a personal bias or prejudice" against it, as contemplated by 28 U.S.C. §144. Fredonia's position that RCA failed to show that the trial judge "was actually engaged in actions that compromised his integrity" (Pet. 10) and that the law clerk "engaged in any improper action" (Pet. 11) is addressed to an issue never present in this case, and simply attempts to shunt attention away from the questions centering on

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*Fredonia raises its statutory claim for the first time in this case in its petition. An examination of the hearing record (A. 286-309) and Fredonia's written opposition at the trial level reveals Fredonia understood then, even if it has forgotten now, that RCA's motion was to have Fredonia's law firm declared disqualified before this particular trial judge alone. (A. 79-83).

ethical disqualification based on the self-evident appearance of impropriety created by the law clerk and his firm.

RCA made perfectly clear to the trial judge that its motion for a declaration of disqualification and recusal was not based upon known improprieties by the judge but that there was a "very real appearance and possibility of impropriety" (A. 292), deriving from the relationship of the former law clerk as active counsel in the court of his prior employer in a case in which he had had extensive participation as a clerk. Neither the trial judge nor the law clerk came forward with any disclosure or explanation of the circumstances surrounding the judge's letter to the clerk, nor was there any disclosure or explanation by the law clerk and his firm of the extent to which the law clerk had already participated in work of the firm on behalf of Fredonia in this case. Once RCA was confronted with the trial judge's direct communication about the case to his former law clerk and the clerk's appearance in court on behalf of Fredonia, RCA was entitled to a proceeding without fear of advantages to Fredonia. RCA candidly expressed its fears of the "very distinct advantage to Fredonia" (A. 292) in having the advice and counsel of a lawyer with the law clerk's experience and his knowledge and "feel" of the trial judge's innermost thoughts about the merits of this very controversy.

What Fredonia conveniently attempts to sidestep and what the court of appeals' decision correctly points out is that the *only* proper remedy in the event of disqualification under the unique circumstances of this case was recusal of the trial judge (569 F.2d at 255, 257):

> Once it appeared that Fredonia might have an unfair advantage in the litigation because its counsel included a lawyer who had been exposed to the trial judge's innermost thoughts about the case, the trial judge had no alternative to disqualifying himself.
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> • • •
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> Disqualification of counsel is a drastic measure and conceivably could have due process implications, especially when counsel has served throughout proceedings as involved and lengthy as these and the client's investment in legal representation is substantial.



The salutary ethical considerations which required the declaration of disqualification sought by RCA are well established and re-affirmed in the Opinion.* No purpose can be served by this Court's repetition of these concepts. There is no more plain-spoken and unequivocal statement of the matter than Rule 7 of this Court:

> No one serving as a law clerk . . . after separating from that position . . . shall . . . ever participate, by way of any form of professional consultation and assistance, in any case that was pending in this court during the period that he held such position.

Fredonia feebly argues that application of this rule in the district courts somehow will cause "havoc" in the judicial system of assigning cases. But RCA does not contend, and the court of appeals did not hold, that law clerks or their firms are disqualified from representing all their clients in the courts of the clerk's former employer. Rather what is prohibited is a law clerk actively representing a client in the same court where he had actually participated in the case as a clerk. In such rare situations, a non-prejudicial transfer of the case to another court where no dis-

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* 28 U.S.C. §455; See also Rule 4, Rules of the United States Court of Appeals for the District of Columbia (A-2); Rule 4, Rules of the United States Court of Appeals for the First Circuit (A-2); Volume 1A, Article 12, §8 State Bar Rules, Texas Revised Civil Statutes (Canon 9, Code of Professional Responsibility)

qualifying relationship exists would cure the disqualification altogether. Fredonia's argument improperly subordinates critical issues of the integrity of the judicial process to hypothetical claims of administrative inconvenience.

Moreover, Fredonia's argument ignores the accomplished fact in the present case of active participation by the law clerk in representing his client in the trial court and the unexplained communication between the trial judge and his former clerk about this case. There is no reason to suspect that vigilant counsel and courts cannot take such actions as are necessary to prevent similar situations before they reach the stage of an irrevocable taint on the fairness of a proceeding. The strongest policy consideration clearly is that ethical considerations should not permit a retiring law clerk to market his familiarity with a judge's thoughts about a particular case in order to obtain desired employment.

**Damage Issues.**

The court of appeals devotes part II of its Opinion to a thorough exposition of the basis in Texas law for actual and exemplary damages, and the proper measure of damages under governing Texas Supreme Court decisions; it also sets forth the items of damage which may be recovered on another trial by Fredonia under these governing Texas tests. 569 F.2d at 257-259. *Fredonia does not question the correctness of the Texas law of damages as declared by the court of appeals.*

Rather, petitioner's one paragraph concerning damages (Pet. 12) is essentially a complaint only of the absence in the language of the Opinion of verbiage that the errors in the trial court's charge were "harmful" or that they "resulted in an erroneous verdict."



In light of what the Opinion does say about the charge which was given, the evidence which was permitted to be introduced, and the elements of unallowable damage which were necessarily included as a result, petitioner's argument can only be fairly characterized as frivolous. Certainly such a contention contains no attraction to the standards for review on a writ of certiorari by this Court, as expressed in Supreme Court Rule 19 or otherwise.

Similarly petitioner presents no contention at all with respect to the court of appeals' remand for allowance of RCA's counter-claim as set forth in part III of the Opinion, 569 F.2d at 259-260.

## CONCLUSION

Petitioner has failed to demonstrate that any of the independent grounds for reversal set forth in the decision below merit the exercise of this Court's discretionary review by writ of certiorari.

For the reasons stated, the petition should be denied.

Respectfully submitted,

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July 28, 1978

## CERTIFICATE OF SERVICE

I, Marvin S. Sloman, counsel for RCA Corporation, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 28, 1978 the foregoing Brief in Opposition of respondent RCA Corporation was served on petitioner by mailing copies thereof by United States mail postage prepaid to Joseph D. Jamail, Esq., counsel for petitioner, at his office at 3300 One Allen Center, Houston, Texas 77002.

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MARVIN S. SLOMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
POST OFFICE BOX 330
TYLER, TEXAS 75701

CHAMBERS OF
WILLIAM WAYNE JUSTICE
JUDGE

February 21, 1974

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Re: Civil No. 5149, Fredonia v.
RCA, Tyler Division

Gentlemen:

The court has had before it for some time the defendant's motion for entry of judgment on its counterclaim in the above-entitled and numbered civil action. The court has delayed ruling on the motion in anticipation of a response from the plaintiff, but it cannot wait indefinitely. This letter is to inform you that the court will rule on the motion in ten days, in the absence of a response if necessary.

Very truly yours,

Wm. Wayne Justice

William Wayne Justice
U.S. District Judge

**Local Rule 4, United States Court of Appeals for the District of Columbia:**

No one serving as a law clerk or secretary to a member of this court or employed in any other capacity under this court shall engage in the practice of law while continuing in such position; nor shall he after separating from that position practice as an attorney in connection with any case pending in this court during his term of service, or permit his name to appear on a brief filed in connection with any such case.

**Local Rule 4, United States Court of Appeals for the First Circuit:**

No one serving as a law clerk to a member of this court or employed in any other capacity under this court shall engage in the practice of law while continuing in such position. Nor shall he or she after separating from that position practice as an attorney in connection with any case pending in this court during his term of service, or appear at the counsel table or on brief in connection with any case heard during a period of one year following separation from service with the court.